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INTER ALIA

Judicial salaries

It is most satisfying to see that the members of the Judiciary, who have for so long been most inadequately remunerated, are to receive a salary that fairly accords with their status and responsibilities. The increases are substantial and are not limited to cost-of-living type increases but reflect a more general review of judicial salaries.

The Chief Justice will now receive $46,365 per annum. This compares with the Prime Minister who receives $45,000. The President of the Court of Appeal will receive $44,365 and the Judges of the Court of Appeal and other Supreme Court Judges $42,865. This compares with the salary of the Deputy Prime Minister which is $35,000 and that of Ministers of the Crown holding a portfolio of $31,000.

A Judge of the Compensation Court will receive $33,365, Chief Judge of the Maori Land Court $32,365 and a Judge of the Maori Land Court $29,365.

It was particularly gratifying to see the salaries of Magistrates increased to $32,365. The Beattie Commission recommended that a Magistrate's salary should initially be 75 percent of that of a Supreme Court Judge. The new scale places a Magistrate at 75.5 percent.

To complete the comparison with Parliament various other office holders in Parliament receive between $20,000 and $31,000 while a Member of the House of Representatives receives $18,000 per annum and in addition there is provision for various allowances.

Now that the Higher Salaries Commission has properly recognised the position of the Judiciary might it be suggested that attention be directed to another vexed issue – that of precedence. It is worth restating the remarks of Sir Richard Wild as recorded in the Beattie Commission Report:

> "There are from time to time some signs that the executive government plays down the role of the Courts and the position of the Judges. A striking example of this, deplored by many others in the community apart from the Judges themselves, was the action of the Prime Minister at the time in publishing a new Order of Precedence on 9 January 1974 which places the Judges below ordinary Members of Parliament. This was a reversal of the relative positions of the two groups as they had stood ever since an Order of Precedence was first established in New Zealand at the beginning of the century and it was all the worse because it changed the basis on which all the Judges had been appointed. In both Australia and Canada the Judges rank several places higher than Members of Parliament. In the United Kingdom, where the whole system began, Members of the House of Commons have no place at all on the Order of Precedence. This New Zealand demotion of their official status has been a matter of very deep concern to the Judges as being entirely contrary to established constitutional principle and practice and as amounting to a public downgrading of the Judiciary. It should be put right".

Co-operative forestry companies

The co-operative Forestry Companies Act is among those currently awaiting the Royal Assent. It has been awaited with interest by many small forest growers in New Zealand. When introducing the Bill last September the Minister of Justice, Mr Thomson, indicated that about 2000 growers had already established small forest and wood lots pursuant to various Government incentive schemes. As co-operatives are formed many

practitioners can expect to be consulted on the legal ramifications of joining. The question of how shares in a co-operative are to be dealt with will also arise on the sale of farms.

The Act enables co-operatives to be established for the protection and management of forests and the utilisation or marketing of forest produce for its shareholders. Membership is limited to those who have at least four hectares of land in forest and is optional. It is likely that the stronger negotiating position of a co-operative when it comes to marketing will make membership attractive. There was also the slightest hint in the Minister's introductory remarks that further tax incentives may be made available to co-operatives. Some such form of encouragement to entry would come as no surprise, for knowledge of the level of supply contracts between farmers and co-operatives would give a better measure of timber available from the small scale private sector and this would doubtless have some bearing on the Government's own forestry plans.

Two particular features of the Act that deserve noting are firstly that shareholders do not need to own the fee simple of the land on which the forest is grown. It suffices that they be entitled to use and occupation of the land and have the right to dispose of forest produce on the land until the maturity of the crop. Secondly, supply contracts between farmer and co-operative may be registered against the title to the land. Both matters will have some bearing on conveyancing practice and should also be considered from the estate planning point of view.

The provision for registration of supply contracts is doubtless intended primarily for the protection of the co-operative. Where the forestry development is carried on under licence it will also protect the interest of the licence holder. The point to note though is that contracts may be registered only "against the title of that owner or occupier to the land to which the supply contract relates". Thus, if the contractor has no registered interest in the land he has no title against which a supply contract may be registered. It may well be that co-operatives will insist on the owner of the fee simple joining in. This type of situation is only likely to arise in dealings within a family but where formal separation of farming and forestry is desirable and where dates are likely to be important from the point of view of income tax, estate or gift duty then the complicating effect of the Land Settlement Promotion and Land Acquisition Act 1952 should be remembered when it comes to ex post facto documentation of informal arrangements. There is no substitute for setting the matter up properly in the first place.

The other angle from which forestry co-operatives should be viewed is that of estate planning. That forestry interests may be separated from the fee simple will enable the co-operative shares to be held by a family trust. It will also remain open to a farmer who wishes to sell his farm to retain his interest in any wood lots. If either of these courses are adopted it should be noted that the Act does not create or reserve any rights of entry on to land. These rights would still need to be created by way of lease, licence or easement as was the case before the Act was passed. In that sense there is no change. However, there may be advantages in being able to keep the forestry income completely separate by channelling it through the co-operative. If the co-operatives offer management and cultivation services then they would be even more attractive to trustees and retired farmers.

We will be seeking more informed comment on the matters outlined because small wood lot projects are from time to time mooted as having tax advantages and providing funds for retirement (if planted soon enough). We would be interested in hearing from those who have studied the legislation on the pros and cons of forestry co-operative membership.

Tony Black

Judicial notice – "Showground" is a word of normal parlance – not a term of art requiring interpretation with expert assistance. It is a word to be interpreted by the judge, using his knowledge of the language, and his acquaintance with accepted applications of the word to situations arising in the normal life of the community in which he lives. *Judicial knowledge is the knowledge of the ordinary wide-awake man, used by one who is trained to express it in terms of precision.* The learned judges in the courts below seem to have had no doubt as to the kind of purposes which would be accepted as included in "showground purposes": "It is . . . common knowledge that voluntary associations exist in scores of towns and districts of Queensland for the purpose of holding an annual 'show' or exhibition. The 'showground' is the area where that show or exhibition is held. . . . The activities of the 'shows' according to the evidence in this case are broadly similar. To the extent that there is an exhibition of agricultural and horticultural produce it would scarcely be disputed that this activity would probably operate to encourage agriculture and horticulture in the region and thus would be a charitable purpose". *Brisbane City Council v A-G* (1978) 19 ALR 681 (PC).

CASE AND COMMENT

Bailees as insurers

When a Judge, with expressions of sympathy for the defendant, concludes that he is bound by law to find for a plaintiff whose case he says has no merits to support it, a common lawyer may be excused for wondering whether the law (at least if it is case law rather than statutory) has been correctly stated or applied. *Mitchell v London Borough of Ealing* [1978] 2 All ER 779 is a case where the learned Judge, O'Connor J, thought himself so bound. With respect, it is submitted that it is also a case where a degree of scepticism might not be altogether unjustified.

The plaintiff had been evicted under a possession order from a council house in which she had been a squatter. From what O'Connor J characterised as the "goodness of their heart, despite the woeful treatment to which they had been subjected by thoroughly dishonest people", the council's representatives offered to store the plaintiff's furniture free of charge until she could make arrangements for its collection. She accepted and in due course arrangements were made for her husband to meet a council representative at a rent office and from there to proceed to the place where the furniture was stored so that the husband could remove it. By a mistake, for which the council was responsible, their representative went instead directly to the storage place. Accordingly the meeting failed to take place. For their own purposes, the plaintiff and her husband had concealed their whereabouts. There was nothing the council could do but wait for the plaintiff to communicate with them again. It was nearly a month before a further meeting was arranged. In the meantime, through no fault of the council, the furniture had been stolen. The council was held liable for the loss on the ground that, from and after their negligent failure to keep the earlier appointment, they had in effect been insurers of the plaintiff's goods.

There is, of course, no question but that a gratuitous bailee who wrongfully *refuses* to restore bailed goods after proper demand has been made detains them thereafter at his peril (eg Paton, *Bailments in the Common Law* (1952) p 111). In the instant case, however, there had been no refusal but only a negligent failure to keep an appointment. The learned judge held that this act of negligence had had in law the same consequences as a refusal. He relied on *Shaw & Co v Symmons & Sons* [1917] 1 KB 799. That was a case where the defendant had agreed for consideration to bind such books as the plaintiff sent him and, once bound, to retain them until called upon. On the occasion in question, the plaintiff had duly called for delivery of some books. It was wartime and the defendant, complaining he was short or labour, had still not returned the books when, 13 days later, they were destroyed in a fire without any fault on his part. Avory J held that under his contract the defendant was bound to return the books within a reasonable time after demand. His delay had been unreasonable and he was therefore liable as an insurer for the loss of the books.

No doubt, at first sight, *Shaw & Co v Symmons & Sons* may appear to be a case where a negligent failure to return goods made a bailee an insurer of them. But a closer analysis reveals that the significance of the defendant's delay lay not in its carelessness but in the fact that it exceeded a reasonable time. That meant that before the loss by fire occurred, the bailment of the books (since it was to last only for a reasonable time after demand) had expired. It is clear law that a bailee who wrongfully retains goods after the expiry of the bailment does so at his peril (eg *Coggs v Bernard* (1703) 2 Ld Raym 909, 915, per Holt CJ).

Why the distinction just made should be important, and indeed crucial, goes back to the very nature of bailment at common law. Bailment is commonly thought of as imposing obligations on a bailee, but it does in fact also serve as a protection for him. Most bailees are liable for loss or damage to the bailed goods only where it has been the result of their want of care. The exceptions are common carriers (including carriers by sea) and innkeepers who are subject to a so-called "insurer's" liability, but even they are protected where the loss or damage is the result of the act of God, of the Queen's enemies, or of inherent vice. But with the possible exception of inherent vice all of these protections, being incidents of the bailment relationship, are lost once the bailment terminates or when the bailee deals with the goods otherwise than within the conditions of his bailment.

Termination occurs, of course, when the term runs out. It can also be the result of a discharge for breach. Classically, the latter requires notice of termination by the injured party. Even a conversion, while it gives the bailor an immediate right to possession, does not by itself

determine the bailment contract *(Reliance Car Facilities Ltd v Roding Motors* [1952] 2 QB 844). A conversion can, nevertheless, make the bailor an immediate insurer because it constitutes a dealing with the goods outside the conditions of the bailment relationship. Why dealings which fall outside the bailment relationship, commonly called deviations and quasi-deviations, are not protected by it has not always been fully understood (eg *Hain SS Co v Tate & Lyle* [1936] 2 All ER 597). But, for present purposes, the more important point is that not every wrongful act by a bailee is a deviation or quasi-deviation. In particular, negligence *(Smackman v General Steam Navigation Co* (1908) 13 Comm Cas 196) and delay *(The Monarch* [1949] AC 196) are not in themselves deviations. They constitute wrongful conduct within the relationship rather than dealings outside it.

To return to *Mitchell v London Borough of Ealing* [1978] 2 All ER 779, the council would have lost the protection of their bailment and have been liable as insurers if their failure to keep the initial appointment marked the termination of the relationship either from expiry of its term or from discharge for breach. Alternatively they would have been liable had their failure to keep the appointment been a quasi-deviation. On the facts stated in the judgment, it is submitted that the council ought not to have been held liable under any of these heads. The council's negligence. and the delay caused thereby, could not in themselves be deviations. Nor was there any discharge for breach (or its equivalent in a gratuitous bailment) since no notice of termination was given. Had there, then, been an expiry of the term? On the authority of *Shaw & Co v Symmons & Sons* (supra), as in common sense, the council had a reasonable time within which to surrender the plaintiff's goods. And here it must be remembered that the bailment was a gratuitous one. More, it was an act of kindness on the council's part to dishonest people who had treated them woefully. In these circumstances, would it really be a necessary inference that a time which was to be reasonable *as between these particular parties* would have included no margin for inadvertence, no allowance, that is, for the possibility of confusion over the place at which an appointment was to be kept? In other words, had the council, on discovering the mistake, communicated with the plaintiff that same day in order to make another appointment, would they had done so too late because the time which was reasonable as between them would have expired an hour or two earlier? If the council had at that point really gone beyond the bounds of what was reasonable in relation to this particular plaintiff, the learned Judge could hardly have concluded that her claim had no merits to support it. On the other hand had a reasonable time not expired at that point, the subsequent delay would have been irrelevant, since it was apparently brought about by the plaintiff's deliberate withholding of her whereabouts. The council would not have been liable for the loss which occurred.

A further discussion of deviation and quasi-deviation is contained in Chapter 6 of the present writer's book on *Exception Clauses,* and again at [1970] CLJ 221.

Brian Coote

PRACTICE NOTE

Application for probate by Spouse of deceased

Section 2 of the Wills Amendment Act 1977 provides:

> **"2 Effect of divorce, etc, on wills** – (1) Where at the death of any person there is in force any absolute decree or order or any legislative enactment for the divorce of the person, or for the dissolution or nullity of the marriage of the person, and that decree or order or legislative enactment would be recognised by the Courts in New Zealand, any will of the person that was made before the decree or order or legislative enactment shall be read and take effect subject to the following provisions of this section.
>
> "(2) Subject to the following subsections of this section, in any such will of any person –
>
> "(a) . . . .
>
> "(b) The appointment of that other partner as executor or trustee or advisory trustee of the will of that person shall be null and void . . ."

The following minute of Quilliam J (*Re Pomeroy* (Supreme Court, Wellington. 29 September 1978 (P 1133/78)) requires an addition to the affidavit to lead grant of probate in situations falling within that section.

I have considered the effect of s 2 of the Wills Amendment Act 1977, on applications for probate by a person referred to in the will as a spouse of the deceased. I regard it as necessary that in such cases the affidavit to lead grant as to probate should deal expressly with the situation contemplated by that section. No doubt the form in the First Schedule to the Code will in due course require amendment. In the meantime there should be a paragraph in the affidavit (or, where necessary, a separate affidavit) in the following terms:

> " 'That at the time of his/her death there was not in force any decree absolute or order or any legislative enactment for divorce or for the dissolution or nullity of the marriage between the said deceased and myself.' "

LAND TRANSFER

PRESCRIPTIVE TITLE — PROTECTING THE POSSESSOR

By APS ALSTON, *lecturer in Law, University of Canterbury*

When the Land Transfer Bill was introduced in Parliament in 1963, the Minister of Justice, JR Hanan announced that it had a twofold objective: first, "of allowing people who have occupied abandoned land over long periods to obtain title" and secondly, "of enabling persons with a defective title who have owned or occupied land for a lengthy time to perfect their title".

These objectives, while worthy in themselves, do not contemplate the common situation of one person occupying land registered in the name of another person neither being aware that the first person is not the registered proprietor. In this situation it cannot be said that the land is abandoned. The registered proprietor does not know that it is his to abandon. Nor can it be said that the person in possession of the land has a defective title. He has no title.

Although this situation was not contemplated, the possessor of the land is able, under the Act, to apply to the Registrar for the issue to him of a Certificate of Title in respect of the land. If he proves to the satisfaction of the Registrar and the Examiner that he has been in possession for a continuous period of 20 years and continues in possession and the possession is of the kind contemplated by the Limitation Act 1950, the Registrar is required to publish notice of the application in at least one local newspaper and to serve notice on any person "who is shown by the Registrar to have or who in the Registrar's opinion has or may have any estate or interest in the land or any part thereof".

It is at this stage of the proceedings that problems arise for the applicant. The Act provides that "any person claiming any estate or interest, whether legal or equitable or beneficial, in the land or any part of the land to which any application relates may (within the prescribed time) lodge a caveat ... and forbid the granting of the application ...." If the Registered proprietor lodges a caveat the Registrar has no choice but to refuse the application. As a result, the unfortunate applicant will not only fail in his attempt to have the land registered in his name, but will probably also lose possession of the land which he has possessed and used as his own for more than 20 years.

Adverse possession claims of this type often give rise to bitterness. The applicant no doubt feels that he is entitled to retain the land that he has for many years regarded as his own. To him paper boundaries are irrelevant. What matters are actual visible boundaries. He is unlikely to say "How lucky I am to have had for so long the use of this land to which I am not entitled". The registered proprietor usually sees the situation in a different light. To him, the certificate of title represents his rights in respect of all the land comprised in it. It is unlikely that he will take the view that he was happy with his possessions before the application and that he will be happy with the same possession after the application. Both the applicant and the registered proprietor are eminently reasonable men.

In ascertaining the respective rights of these reasonable men, the New Zealand solution has been to give priority to the registered proprietor. This is contrary to the approach taken in other jurisdictions where the solution adopted is to give legal recognition to the de facto situation. The rationale of this approach was stated in *Marquis Cholmondeley v Lord Clinton* (1820) 2 Tac & Wl, 139–140; 37 ER 527, 577 by Sir Thomas Plummer MR:

> "The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility .... The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question .... The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and experience of himself and his family may have been ... unalterably formed and established".

In the context of the Torrens System, this attitude is given statutory form by the Victorian *Transfer of Land Act 1958*. The procedure to be followed by the applicant and the Registrar is similar to that provided for by the New Zealand

Act. The significant difference is that if the applicant establishes his claim he is entitled to become registered proprietor of the land. The Act provides that a person claiming any estate or interest in the land in respect of which any application is made may before the granting of the application lodge a caveat with the Registrar forbidding the granting of the application. However, the lodging of a caveat will not result in the application being refused unless the caveator is able to show that the applicant's claim is defective – eg, if the applicant has not been in possession for the prescribed time.

It would seem that, if legal recognition of the rights of the long continued possessor is desirable, the scheme of the Victorian Act is to be preferred to that of the New Zealand Act. However, it is important to recognise that there are cases where the registered proprietor should be given priority.

Such a case is *Haywood v Challoner* [1967] 3 All ER 122; [1968] 1 QB 107. The plaintiffs owned land next to a church. They were staunch supporters of the church and for some time they and their family before them had allowed the rector to use it as a garden paying no rent. The rector allowed a motor coach proprietor to put his motor vehicles on the land and also to erect a Nissen hut on it. The rector then proposed to sell the land to the motor coach proprietor. When the plaintiffs objected, the rector claimed that the statutory period of 12 years had elapsed since the last payment of rent and that the plaintiffs had lost their title as a result of section 9 (2) of the Limitation Act 1939, which provided that a non-written periodic tenancy was deemed to expire at the end of the first period and that the landlord's right of action to sue his tenant for possession was deemed to accrue then or on any later payment of rent. Section 10 of the Act provided that a right of action to recover was not deemed to accrue unless the land was in "adverse possession". The plaintiffs brought an action to establish their title.

In the Court of Appeal, Davies & Russell LJJ with regret held that the plaintiffs had lost their title to the land and that the rector had established his claim to a squatters title. Lord Denning dissented on the grounds first, that the rector had not been in possession for 12 years and he could not add previous periods of possession by his predecessors because there had been vacancies in the living and secondly, that the possession was not adverse in that the user of the land was not inconsistent with the owner's enjoyment. The owner was content to let it be so used: just as if he had permitted it to be used under a licence.

The case has been criticised because of the individual injustice accorded to the plaintiffs. Both Davies and Russell LJJ appeared unhappy with the result but as Russell LJ said:

> "The generous indulgence of the plaintiffs and their predecessors in title, loyal churchmen all, having resulted in a free accretion at their expense to the lands of their church, their reward may be in the next world; but in this jurisdiction we can only qualify them for that reward by allowing the appeal and dismissing their action".

If similar facts arose in New Zealand – that is, if through the generosity of a registered proprietor another person was permitted to occupy land rent free for a period of more than 20 years and that person then applied under s 3 of the Land Transfer Amendment Act 1963 for a Certificate of Title – the title of the Registered Proprietor would be safeguarded. All he would have to do is lodge a caveat under s 9 of the Act and the Registrar would then refuse the application.

However, bearing in mind that in most cases it is desirable that the long continued possessor should be allowed to retain the land, it is preferable that the anomolous case of the deserving registered proprietor be solved in some other way.

One possible solution is to give the Registrar a discretion to refuse application on the basis of the applicant's unconscionable conduct. It is suggested that this would only result in uncertainty and that in any case the motives, intention or belief of the applicant is immaterial. A better solution would be to include in the legislation a requirement that possession be adverse in the sense used by Lord Denning.

Thus, where a person is permitted by the registered proprietor to possess and use land for a particular purpose, so long as he uses the land for that purpose, he would not be in adverse possession. The user of the land would not be inconsistent with the owners' enjoyment.

Conclusions

The Act should be amended so that any person who has fulfilled the requirements of s 3 be issued with a title to the land which he possesses. If the Act is so amended, it should also be amended to import the principle that possession be "adverse".

"This submission . . . really amounts to a plea that I should penalise the respondent for failing to act as a 'reasonably prudent' husband, but I think the Act presents enough difficulties without attempting to import the standards of that unadventurous bore into its provisions." – Roper J.

CONSTITUTIONAL

REVIEW OF REGULATIONS UNDER STANDING ORDERS

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A useful procedure for the review of statutory regulations in New Zealand has existed for some 16 years. Until last year the procedure had been invoked only once. This is surprising in view of widespread criticism of delegated legislation and of the power of the Executive. At the same time the procedure itself has not obtained the publicity that a Parliamentary mechanism of such importance should have.

History and origin of the reviewing power

Two recent reports of the Statutes Revision Committee *(a)* deal with the procedure which comes under Standing Orders 378 and 379. These reports give an account of the application of these Standing Orders in two reviews which the Committee conducted last session.

These two reviews represented only the second and third occasions on which the procedure had been used since its establishment in 1962 following the report of a Select Committee *(b)*. The Report resulted in a Standing Order, currently SO 378, which states:

> "At the commencement of every Parliament a Statutes Revision Committee shall be appointed to consider all Bills containing provisions of a technical legal character which may be referred to it; and to consider any regulation within the meaning of and published pursuant to the Regulations Act 1936 which may be referred to it, with a view to determining whether the special attention of the House should be drawn to the regulation on any of the following grounds:
> "(a) That it trespasses unduly on personal rights and liberties:
> "(b) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
> "(c) That for any special reason its form or purport calls for elucidation:
> The Committee to have power to sit during any adjournment or recess; to require any Government department concerned to submit a memorandum or to depute a witness for the purpose of explaining any regulation which may be under its consideration; and to report to the House or the Government from time to time".

The procedure for activating the review is contained in SO 379 which states *(c)*:

> "Any regulation within the meaning of and published pursuant to the Regulations Act 1936 may be referred to the Statutes Revision Committee during an adjournment or recess by the Chairman of that Committee, who may summon the Committee to meet for the purpose of considering that regulation:
> "Provided that if five members of the House request that any such regulation be referred to the Committee for consideration, the Chairman shall summon the Committee at the earliest convenient time:
> "Provided, also, that if it is desired to refer a regulation to the Committee at a time when there is no Chairman or the Chairman is absent from New Zealand, the Clerk of the House shall summon the Committee if requested to do so by five members of the House".

As indicated above, the Standing Orders had their immediate origin in a report of a Select Committee of the House of Representatives appointed "to consider the desirability of introducing an effective form of parliamentary control of delegated legislation".

The Committee was requested "to review the schemes at present operating elsewhere in the Commonwealth and to make such recommendations as may be thought necessary for the provision of a suitable form of scrutiny of delegated legislation and law-making powers in New Zealand . . . " *(d)*.

(a) JHR 1977, pp 56–58 and pp 140–145.

(b) *Report of the New Zealand Parliamentary Committee on Delegated Legislation* App JHR, 1962, I–18. We will hereafter refer to the Committee and its report as the "Algie Committee" and the "Algie Report" respectively, the Hon RM Algie having chaired the Committee.

(c) *Standing Orders of the House of Representatives Relating to Public Business.* (1975 reprint).

(d) Report of the Algie Committee, Orders of Reference.

The spur to this re-examination of the New Zealand procedures may have been partly provided by the publication in 1960 of J E Kersell's study entitled *Parliamentary Supervision of Delegated Legislation (e).* The writer undertook a comparative survey of British, Australian, Canadian and New Zealand procedures for scrutiny of delegated legislation. One of Kersell's conclusions was that "the Parliament of New Zealand has been the most lax in not providing protection to persons who find themselves subject to subordinate laws" *(f).*

The Committee comprised four members who were either Ministers or former Ministers. Four members of the Committee were members of the legal profession. In addition to reports provided by the Chairman and the Secretary, members studied the proceedings and conclusions of the House of Commons Select Committee on Delegated Legislation 1953, chaired by Mr Clement Davies, and also the report of the Committee on Ministers' powers chaired by the Earl of Donoughmore. Indeed, the Committee adopted the Donoughmore Committee's summary of their "reasons for the belief in the need for delegated legislation" which were *(g):*

(a) Pressure of Parliamentary time
(b) Technicality of the subject matter
(c) Unforessen contingencies that may arise during the introduction of large and complex schemes of reform
(d) Need for flexibility
(e) Opportunity for experiment
(f) Emergency conditions requiring speedy or instant action.

In explaining the background to its conclusions the Committee stated that it had the following aims *(h):*

> "First, to ensure that the empowering clause in the parent Act is so worded as to confer no more than a limited authority upon the person or body to make the delegated legislation. Secondly, to ensure that the right of the citizen to appeal to a court to test the validity of a piece of delegated legislation is not in any way taken from or denied to him. Thirdly, to ensure that the delegated legislation that is so made does not go beyond certain principles of fairness and freedom to the individual without reference to Parliament".

The Committee acknowledged that "the authority of the Courts to examine and pronounce upon the vires or validity of delegated legislation is fundamental and must be preserved and protected by any means that are both legitimate and practical" *(i).*

As to the third aim – controlling delegated legislation – the Committee firmly discounted the suggestion of a scrutiny committee on delegated legislation such as had been appointed in other Commonwealth countries. It stated that the work of supervising delegated legislation was already being satisfactorily performed by the Law Drafting staff and by an advisory officer on the staff of the Justice Department *(j).* The Committee added that there was no evidence of abuses to support such a recommendation. It did, however, recognise "that the system at present being followed in New Zealand, though good and efficient, is in a sense 'ministerial', 'official' or 'bureaucratic'. It is not, in a direct sense, 'parliamentary' ". The Committee considered that what was required was "a system under which a real measure of control can be exercised by Parliament itself" *(k).* Noting that it was customary for each Parliament to set up a special select committee known as the Statutes Revision Committee consisting of "lawyers and laymen of wide experience", the Committee recommended that the Statutes Revision Committee "should be given the responsible task of supervising such delegated legislation as might be referred to it by Parliament" *(l).*

After pointing out that the Committee normally worked only while the House was sitting, the Report recommended that the Chairman "should be given power to call it together during recess to examine some particular piece of delegated legislation if and when asked to do so by an individual Member of the House. The Chairman should be under an obligation to do so if and when called upon to act by a requisition signed by at least five members of Parliament" *(m).*

The Conclusions and Recommendations of the Committee are worth recording more fully in order to provide the context from which the Committee's proposals for review procedures emerged. They were *(n):*

> "27 The Committee . . . submit . . .
> (1) We do not agree with those who contend

(e) Stevens and Sons, London, 1960.
(f) Kersell, p 162.
(g) Algie Committee, para 6.
(h) Ibid, para 21.
(i) Ibid, para 23.
(j) Ibid, para 24. The post of advisory officer referred to was later not continued.
(k) Ibid, para 25.
(l) Ibid, para 26.
(m) Ibid, para 26.
(n) Ibid, para s 27, 28. 29.

that the practice by which Parliament passes over to a designated subordinate authority the power to make regulations, rules and orders is either wholly or even substantially bad in itself. On the contrary, the practice when properly employed has certain very definite advantages. It is indeed inevitable and must be regarded as a necessary attribute of Parliamentary government. Even although there are some risks incidental to its employment they are not so serious as they are sometimes said to be but some safeguards are required if the country is to enjoy the benefits of the practice without the possibility of abuse.

(2) In our view regulations which are of an emergency nature or which impose or vary taxation should be given a limited life unless they are specifically confirmed by Act of Parliament.

(3) The Committee recommends:

(a) That all clauses in Bills coming before the House in which it is proposed to empower the making of regulations be drafted as closely as possible in accordance with the model fixed in 1961, as exemplified by s 73 of the Licensing Amendment Act 1961, so as to ensure *(o)*:

(i) That the precise limits of the law-making power conferred by Parliament are set down as clearly as possible in the enabling Act, and

(ii) That the jurisdiction of the Courts to review delegated legislation and to determine its validity should not be excluded or reduced, and that as opportunity offers, existing statutes be amended to conform to this principle.

(b) That the Statutes Revision Committee be empowered to consider every regulation which may be referred to it, and that it be given the power to sit during the recess for that purpose, if required

(c) That consideration be given to the enactment in statute form of any existing regulations which, because of their importance or stability, could appropriately and conveniently be incorporated in the statute book.

28 For the purpose of giving effect to the latter part of this recommendation, the following proposals are made:

(1) That the Statutes Revision Committee be established by Standing Order, its powers being enlarged to give effect to the recommendation.

(2) That provision be made for regulations to be referred to the Committee by the House, and for the Committee to consider regulations of its own volition when summoned to do so by the Chairman.

(3) That statutory provision be made for all regulations within the meaning of and published pursuant to the Regulations Act 1936 to be laid before Parliament".

The Committee then recommended the Amendment which resulted in SO 378 the text of which has been provided, and went on to recommend that:

> "Any regulation within the meaning of and published pursuant to the Regulations Act 1936 may be referred to the Statutes Revision Committee during an adjournment or recess by the Chairman of that Committee, who may summon the Committee to meet for the purpose of considering that regulation: Provided that if five Members of the House request that any such regulation be referred to the Committee for consideration, the Chairman shall summon the Committee at the earliest convenient time.
>
> "Provided also that if it is desired to refer a regulation to the Committee at a time when there is no Chairman or the Chairman is absent from New Zealand, the Clerk of the House shall summon the Committee if requested to do so by five members of the House".

In making the crucial recommendation as to the grounds upon which regulations were to be examinable, the Committee appears to have traversed a wide array of Commonwealth jurisdictions. The three grounds finally chosen represented a distillation of a variety of tests which the Committee appears to have felt were overlapping and superfluous *(p)*. The writers believe, however, that it is legitimate to note that the three grounds chosen for the New Zealand procedure are similar to those employed in two specific jurisdictions. The first ground finds a parallel in the guidelines provided for the Australian Senate's *Regulations and Ordinances Committee (q)*. The second and third grounds reflect the terms of reference of

(o) This part of the Committee's Recommendations is not directly relevant to our present purposes.

(p) We are indebted to Mr CP Littlejohn, Clerk of the House of Representatives, for his helpful recollections of the background to the work of the Committee. Mr L Marquet also assisted us.

(q) *The Standing Committee on Regulations and Ordinances of the Australian Senate.* For a description of the work of this body, see Kersell, p 31–42, and Odgers, *Australian Senate Practice* (5th ed) 460–465.

the "Scrutiny Committee" of the House of Commons. The activities of these two bodies may therefore throw useful light on the purposes and limits of the power *(r)*. The origin of the grounds becomes significant in relation to any constraints which the Statutes Revision Committee may place upon its investigatory powers.

The three reviews and the committee's recent reports

It may be useful first to set out details of the three reviews in chronological order.

First, *The Food Hygiene Regulations 1952 (s)* came under scrutiny in 1964. The procedure was initiated following the criticism of a Magistrate and a subsequent question to the Minister of Justice in the House. A Resolution of the House, on the motion of the Minister, the Hon Mr Hanan, was the formal initiating step. The Committee appears to have felt some frustration at limitations on information available to it and its recommendations seem to have received a somewhat desultory response from the Department concerned. The result could not be regarded as effacing the force of Kersell's criticism, to which we have referred.

Second, the review in 1977 of the *Rock Lobster Regulations 1969*, Amendment No 8 *(t)* was initiated by complaint to the Chairman of the Committee by a group of divers and the exercise of his extraordinary power applicable when the House is not sitting. This resulted in the revocation of the Amendment by Government on the recommendation of the Committee: the first time this had happened under the procedure and, therefore, a noteworthy event in the procedure's history.

Third, the *Wanganui Computer Centre Act Commencement Order 1977 (u)* came before the Committee in 1977 at the request of five Members of the Opposition in accordance with one of the initiating procedures provided by the Standing Orders. The Committee's recommendation was unfavourable for reasons which will emerge from its Report to which we will refer.

The importance of the decisions in the *Rock Lobster Case* and the *Commencement Order Case* by the Statutes Revision Committee is evidenced by the detailed examination given to them by the Chairman, Mr J K McLay, in his report to the House of Representatives *(v)*.

The rock lobster case

The rock lobster case arose from a claim made on behalf of a group of fishermen who had, until the promulgation of Amendment No 8, earned the whole or part of their livelihood by diving for rock lobster under the terms of licences issued to them by the Ministry of Agriculture and Fisheries. The regulation complained of placed an absolute prohibition on the taking of rock lobster "by the mode of diving or hand-picking".

The petitioners contended firstly that this total prohibition was an undue trespass on the personal rights and liberties of the divers; secondly that the regulations were an unusual or unexpected use of the powers conferred by the empowering statute (The Fisheries Act 1908); and finally that the regulations might be ultra vires.

After reviewing the facts of the case, the Chairman reported that *(w)*:

> "Because the Committee is satisfied that the regulation went further than was necessary to provide for the protection of breeding stock and, at the same time denied persons the right to earn their living (or a part of their living) by means they had previously pursued, we are of the opinion that, in that respect the regulation does trespass unduly on personal rights and liberties. It is not intended, in this report, to detail every circumstance under which such rights and liberties might be adversely affected (even if it were possible to provide an exhaustive list). It is sufficient to observe that the Committee takes the view that in certain circumstances a regulation that prevents a person earning the whole or a part of his or her living could well be such an undue trespass. It is of course axiomatic that every law in some way limits freedom of action; the Committee found it necessary to consider whether the limitations imposed on the divers were excessively great in relation to their personal income or inequitably applied in relation to other sectors of the fishing industry. Furthermore in determining

(r) For more recent account of the work of the British "Scrutiny Committee" as the *Select Committee on Statutory Instruments* is styled, see *Report from the Joint Committee on Delegated Legislation*, 1972, HL 184, HC 475.

(s) SR 1952/74.

(t) SR 1976/293. This inquiry will be referred to as the "Rock Lobster Case".

(u) SR 1977/8. This inquiry will be referred to as the "Commencement Order Case".

(v) JHR 1977, pp 57–58 (Rock Lobster Case). The Report was presented to the House on 3 June 1977 and the Chairman's comments together with the resulting debate are recorded in *Hansard*, Vol 410, 1977, p 390–395. JHR 1977, pp 140–145 (Commencement Order Case). The Report was presented to the House on 27 July 1977 and the Chairman's comments and debate are to be found in *Hansard*, Vol 412, 1977, pp 1625–1640.

(w) JHR 1977, pp 57–58.

the matter, the Committee was anxious to take into account questions of natural justice and looked very carefully at the reasons why the amendment was in fact made".

The Committee did not take the view that the promulgation of the amendment was an unusual or unexpected use of the powers conferred by the Fisheries Act particularly as the Act authorised regulations which impose a total prohibition on the taking of fish. The Committee also concluded that prima facie it appeared that the regulation was within the scope of the empowering statute, adding that "SO 378 does not permit any detailed enquiry into this question" – an observation which will later be examined.

The outcome of the *Rock Lobster Case* appears from the formal report from the Committee that:

> "The Statutes Revision Committee, having heard arguments for and against the Rock Lobster Regulations 1969 Amendment No 8 reports that (pursuant to Standing Order 378) the amendment in question trespasses unduly on personal rights and liberties and, accordingly, recommends to the Government that the amendment be either amended, or revoked and replaced by a new regulation . . ." *(x).*

The commencement order case

The Chairman's Report on the Committee's Review in the *Commencement Order Case* contains a further discussion of the jurisdiction of the Statutes Revision Committee under SO 378. The grievance which occasioned the request for review in the *Commencement Order Case* was that the Wanganui Computer Centre – a sophisticated but controversial information retrieval system – began operations before the entry into force of the statutory safeguards against abuse. The statutory safeguards providing citizens with, for instance, the right to be informed of information concerning them held on the computer, were contained in the *Wanganui Computer Centre Act 1976.* This Act was brought into force by regulation some time after the Computer Centre was in operation. The thrust of the complaint, by the five members of the Opposition, was thus that the regulation bringing the Act into force was mistimed and open to review by the Committee.

The Chairman noted that the Committee had no authority to consider and report on legislation or delegated legislation except the authority it derived from Parliament, adding that in the absence of specific direction from the House, the interpretation of SO 378 was a matter for the Committee itself to determine. He then examined the grounds which provide the test to be applied by the Committee in deciding whether the special attention of the House should be drawn to a regulation. It may be useful to recall that these are *(y):*

(a) that it trespasses unduly on personal rights and liberties:
(b) that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
(c) that for any special reason its form or purport calls for elucidation.

With regard to the first limb, the Committee declared itself satisfied that the Wanganui Computer Centre Commencement Order did not trespass unduly on personal rights and liberties, and that even if it did, at that stage nothing could be done restrospectively to bring the Act into force any earlier.

Moving to the second limb, "unusual or unexpected use of powers", the Committee concluded that this did not confine the Committee to an inquiry into whether the regulation was ultra vires. It cited the Australian Senate practice to the effect that a regulation might be validly made under a statute, and although intra vires might nonetheless be examinable to ascertain whether it was an unusual or unexpected use of the powers conferred by the statute *(z).* The Committee also cited the work of the British "Scrutiny Committee" which had taken the view that the maximum penalty in certain regulations was not related to the seriousness of the range of offences, "and in certain cases would be higher than Parliament could have intended". The British Committee accordingly concluded that the regulations were "an unexpected use" of the statutory power *(aa).*

Adopting these tests, the New Zealand Statutes Revision Committee observed: "In the light of the practice adopted with similar standing orders overseas (and particularly the English example) . . . the Committee concludes that the proper test for 'unexpected or unusual use' is the in-

(x) The recommendation was followed, and the Rock Lobster Regulations 1969, Amendment No 10, SR 1977/270, replaced the total ban by a closed season from 1 March to 15 May.

(y) The writers propose for convenience to refer to the three grounds upon which the review jurisdiction is founded as the first, second and third limbs of SO 378.

(z) JHR, 1977, p 140–145.

(aa) Idem.

tention of Parliament" *(ab)*.

This test was applied in the Commencement Order Case and the Committee reported that:

> "The Committee takes the view that the House must be taken as being a 'reasonable Parliament' and that having regard to all these matters a reasonable Parliament must be taken as intending that an Act (such as the Wanganui Computer Centre Act) should not come into force until such time as its provisions can become both *legally* and *practically* effective. The Wanganui Computer Centre Act commencement order does not offend against this view and thus is not an unexpected or unusual use of the powers conferred by the Act" *(ac)*.

With reference to the third limb of SO 378: "That for any special reason its form or purport calls for elucidation", the Committee considered the meaning of the word "purport" and concluded that it "was most probably meant to cover situations where the language used in an enactment is ambiguous or so complicated that its meaning is not clear". It cited precedents from the UK Joint Committee on Statutory Instruments and concluded: ". . . that only where there is some apparent defect on the face of the regulation itself, will the regulation require elucidation. Any consideration of the substance of a regulation involves questions of policy – and debate on these matters belongs elsewhere than with the Statutes Revision Committee acting under SO 378" *(ad)*.

Applying the test to the Wanganui Computer Centre Act Commencement Order, the Committee decided that the words of the Order were "simplicity itself" and required no explanation as to their meaning.

After consideration of all three limbs of SO 378 the Committee reported "there is no matter on which the special attention of the House should be drawn to the regulation – and reports to the House accordingly" *(ae)*.

Discussion of the committee's interpretation of the reviewing power

Having traced the development of the reviewing power entrusted to the Statutes Revision Committee as a result of the Algie Report, and having noted that body's own interpretation of its powers as a result of the 1977 cases it may be useful to set out some comments on the position as we now find it.

(i) *The development of the procedure*

As to the political will to permit and encourage the development of a forum in which meaningful challenges may be mounted to regulations thought to infringe the grounds laid down as the basis of the Committee's jurisdiction, the Committee's Report contains the following caution by Mr McLay, the Chairman *(af)*:

> "I regard not only the power of referral, but also the power of review vested in the Committee, as both being of a limited nature. Certainly they are powers that have been used sparingly in the past – and in my opinion, should continue to do so if they are to be regarded as effective".

It is of course comprehensible that the development of an untried jurisdiction is a delicate affair, especially when it trenches upon the political process, and that those responsible for its nurturing should wish to keep a steady eye upon the "floodgates". Nevertheless, there is the converse danger that too cautious an approach may generate a negative jurisprudence consisting of reasons why the committee will *not* act rather than of circumstances in which it will. The Chairman's desire to see his Committee's powers "regarded as effective" may, under those conditions, not be fully realised.

(ii) *The scope of the grounds*

As to the scope of the three grounds themselves, we would respectfully submit that the Committee has shown sound instinct in selecting the "undue trespass on personal rights and liberties" limb of its jurisdiction as the most promising for development. This accords both with the origin of the limb and with the aim of creating a procedure satisfying the fundamental principles prompting the Algie Committee recommendations. The "undue trespass" limb appears to reflect the guidelines provided for the Australian Senate's *Regulations and Ordinances Committee (ag)* which has consistently taken a robust view of its role in the scrutiny of delegated legislation.

Furthermore, the Committee's Report in the *Rock Lobster Case* expressly refers to its concern "to take into account questions of natural justice" *(ah)*. It is under this head that factors such as the failure to consult interested parties in the formulation of regulations – a sort of audi alteram partem application – may seem relevant.

As for the "unusual or unexpected use of power" limb, which finds a correspondence

(ab) Idem.
(ac) Idem.
(ad) Idem.
(ae) Idem.
(af) JHR, 1977, p 57.

(ag) *The Standing Committee on Regulations and Ordinances of the Australian Senate.* For a description of the work of this body, see Kersell, op cit, pp 31–42.
(ah) JHR, 1977, p 58.

(together with the third "any special reason" limb) with the terms of reference of the "Scrutiny Committee" of the House of Commons, the Statutes Revision Committee has determined that it is apt to cover intra vires as well as ultra vires situations. In so deciding, the Committee referred to Australian and English experience and reported that the test was whether the "intention of Parliament" contemplated the manner of use of powers in question. The Committee appears to have perceived that it was unreasonable to expect textual analysis of statutory language to yield not only a parliamentary intention concerning the borderline between intra and ultra vires exercises of a power, but also an intention which identifies, within intra vires exercises, those which are "unusual or unexpected" seems open to doubt. However, it is worth remarking that, in pursuit of Parliament's intention, the Committee has not felt itself bound by the judicial practice of excluding evidence of Parliamentary proceedings. In its Report on the *Commencement Order Case*, the Committee observed that:

> "to some extent that intention can be inferred from the statement made by the Minister of State Services in the House during the Second Reading Debate . . ." *(ai)*.

The Committee proceeded to quote the statement in question, and presumably based its decision in part upon it. The Committee thus goes further than the Courts in its efforts to discover the intention of Parliament. With respect, it seems to the writers that this is in accord with good sense in that a denial of access to *Hansard*, Parliament's own record, would be to place an unnecessary barrier in the way of discovering intention.

As to arguments suggesting that regulations may actually be ultra vires, we have noted that the Committee reported that "SO 378 does not permit any detailed inquiry into the question". Nevertheless, in the writers' opinion, the Committee would be justified in making a recommendation to the House that certain regulations which it was examining were ultra vires. To remain silent on such an issue, after regulations had been referred to it, would be failing to fulfil its role of advising the House on legislative questions. Perhaps by stating that the Standing Order "does not permit any detailed inquiry" into ultra vires, the Committee is giving notice that it does not wish to encroach upon the sphere of the Courts. However, it could well be that even a cursory consideration of certain regulations by the Committee could show that prima facie the regulations were ultra vires: in these circumstances the Committee should be prepared to report its finding to the House. The question arises whether, in such an ultra vires inquiry, the Committee would permit itself the same latitude in arriving at "intention" as in the case of an intra vires inquiry directed towards "unexpected or unusual use of powers".

It may be relevant to record Kersell's view that the House of Commons Scrutiny Committee "has . . . given a narrow interpretation to 'unusual or unexpected use' " *(aj)*. This conclusion sits oddly with the more recent evidence that the Scrutiny Committee reports legislation more frequently on that ground than on any other *(ak)*. It may be that this conclusion now requires revision. Sir Cecil Carr, an authority on the subject, explained the British Committee's interpretation by giving an illustration:

> "If you have a price-fixing order for potatoes or whatever you like, and the price goes up 2d, or down 2d, that is policy or merits, but if you found it went up suddenly by 10s, that was something you might regard as an unusual or unexpected use of the power" *(al)*.

The example seems apt. It also raises the difficult question of determining when the Committee's inquiry encroaches inadmissibly upon "policy". The divers' submissions in the *Rock Lobster Case* addressed that issue in the following way:

> "(1) That is not open to the Committee in the exercise of its scrutiny power to the policy underlying the regulation in question. This had been the understanding in the House of Commons Committee even before the inclusion in its terms of reference in 1971 of wording which confined it to an inquiry 'which does not impinge (on the merits of regulations) or on the policy behind it'.
>
> "(2) Notwithstanding conclusion 1, the *implementation* of the policy may be questioned. This is made clear by examination of the Australian experience. On many occasions, the Senate Committee adopts the distinction we have alluded to. It is also clear from the Algie Committee's expressed intention that implementation is relevant. To be more concrete, we consider that we cannot question before your Committee the policies which the *Rock Lobster Regulations* purport to

(ai) JHR, 1977, p 140–145.

(aj) Kersell, op cit, p 50.

(ak) Report from the *Joint Committee on Delegated Legislation*, 1972, p 29.

(al) Quoted in Kersell, op cit, p 29.

(am) *Submissions by the Divers' Group to the Statutes Revision Committee on the subject of Regulations Prohibiting the Commercial Taking of Rock Lobsters by Method of Diving* (SR 1976/293).

implement: ie the determination to conserve crayfish stocks, and the giving of priority to the preservation of export markets. However, it does seem open, and with respect incumbent, on the Committee to inquire whether the subordinate legislation which purports to implement these policies does so in a manner which infringes one or more of the three grounds, or in a way which requires the assent of Parliament in the traditional manner" *(am)*.

The Committee, in its Report, has neither approved nor rejected that attempt to draw the line but we venture to suggest it as a possible test.

(iii) *The procedure before the Committee*

As to the procedure for hearing evidence before the Committee, we suggest that it is critically important that satisfactory understandings and precedents be developed. One of the most significant decisions taken in the course of the *Rock Lobster Case* was that the Report of the Ministry of Agriculture and Fisheries, called for by the Committee, should be made available to the complainant Divers Group and their representative. This decision by the Committee was made in the face of objection by the Ministry but was, we suggest, essential for the satisfactory presentation of evidence, and also to offset the strategic advantage enjoyed by a Government Department. The notion that the Department could communicate the "true" reasons for a regulative policy to the Committee whilst some charade was acted out before the Committee by contestants giving evidence on the basis of ostensible but incomplete reasons, is as offensive to the concept of fair hearing as it is fatal to meaningful constraint upon regulative power. Of course, problems remain. What, for instance, is to happen to Cabinet documents? Clearly these can not be disclosed without breaching their fundamental confidentiality. However, with the exception of these, and possibly other clearly classified documents, the decision by the Committee that the Departmental report called for by the Committee under its powers should be available to parties giving evidence must be regarded as establishing an appropriate and welcome precedent.

Another important aspect of procedure concerns the form of the discussion before the Committee. Technically, the "hearing" is a deliberation of a Select Committee of Parliament assisted by evidence from persons invited by the Committee to attend on such terms as the Committee thinks fit. However, the reality is that a challenge to a regulation will typically originate with an individual or group of individuals and be resisted by the Government Department responsible for the advice upon which it was promulgated: it will be a contest. The extent to which the Chairman of the Committee is able to allow that contest to unfold in a fair and orderly way will determine the usefulness of the hearing to the Committee and the confidence with which citizens come to view it. The hearing of the *Rock Lobster Case*, with which we are acquainted *(an)*, attained those objectives by permitting limited questioning of each contestant by the other through the Chairman *(ao)*. We would suggest that this serves as a promising precedent.

Conclusion

Our purpose in writing has been to record and comment upon the welcome emergence from relative obscurity of a procedure by which regulation-making may, under certain circumstances, be subjected to the scrutiny of an influential body of Members of Parliament. Some anomalies remain. For instance, the initiating procedure differs according to whether Parliament is in session or is adjourned or in recess. Under Standing Order 379, the Chairman's independent power to refer operates only during adjournment or recess, as does a request by five members. A Review under Standing Orders 378 and 379 must take place if requested by five Members of Parliament out of session or if the Chairman so determines, out of session. However, in session a review can only take place on a motion in the House. The situation is, however, not without some ambiguity. It could perhaps be argued that SO 379 applies to both in session and out of session situations. The result of such a construction would be that five members could, in the face of opposition from a majority of members of the House, ensure the referral of a regulation to the Statutes Revision Committee. Indeed, this interpretation was clearly adopted by one member of the Algie Committee. The Member for Egmont, Mr W A Sheat, observed in the debate on the Algie Committee proposals:

> "If the House is sitting a question can be raised on the floor of the House, and if four other members indicate their support of the request the matter will be referred automatically to the Statutes Revision Committee" *(ap)*.

However, both logic and practice point to a different construction, by which the five member procedure would be restricted to the out of

(an) One of the writers, Mr Frame, acted as representative for the divers in the *Rock Lobster Case*.

(ao) Mr J K McLay, the Chairman of the Committee and Mr D F Quigley who acted as Chairman for part of the hearing.

session situation. The tenor and context of SO 379 make it clear that it is confined to providing an extraordinary procedure for referral when the House is not sitting. Such a construction will leave undisturbed the normal procedure by which matters are referred to Select Committees on a motion of the House – preserving the concept of majority decisions.

There may be a good reason for this distinction but it seems to the present writers that the Chairman's independent powers should operate throughout. We suggest this because many complainants may feel that an approach to the Chairman would prevent the issue becoming partisan which it could well become were it raised in the House. It seems anomalous and artificial that complainants taking this view should need to await an adjournment or recess of Parliament in order to proceed in that way. Thus, the change we suggest leaves the existing initiating procedures unaltered but extends the Chairman's independent initiating power to in session situations.

Finally, there have been recent suggestions that an additional, specialised Select Committee might be created to exercise the review powers at present entrusted to the Statutes Revision Committee – perhaps with new terms of reference. Whether such a proposal has merit would depend on the precise composition, jurisdiction and procedure which are contemplated: in any case, the promoters of such a new body would need to ensure that there is no retreat from the authority, jurisdiction or procedure which the present Committee is beginning to develop. At present, the Statutes Revision Committee is composed of those members of the House with a legal background or at least some specialised interest in legislation and legislative reform. Any additional Committee would either comprise the same members or in this field be only a second best team.

The procedures for review should not, of course, distract attention from the need for a proper approach to the making of delegated legislation. This includes consultation with groups affected and a drafting process which has regard to individual rights and liberties.

(ap) *Hansard,* Vol 330, 1962, p 327. It is perhaps worth noting that no other member of the Committee contradicted this interpretation. We are indebted to our colleague, Miss DJ Shelton, for drawing Mr Sheat's observation to our notice.

A NEW CODE OF CIVIL PROCEDURE

The present Code of Civil Procedure came into force on 1 January 1883. Over the years so many amendments have been made that the several parts of the Code no longer speak with one voice. Preparations for a complete revision were put in hand in 1969 when the late Chief Justice, Sir Richard Wild, appointed as a subcommittee of the Rules Committee, Sir Thaddeus McCarthy, Mr Justice Wilson (as he then was), and Messrs J T Eichelbaum and SC Ennor to draft a new Code. The intention was not only to rewrite the present Code but to cast in a new mould the whole concept of civil procedure in the Supreme Court. From the beginning, the Supreme Court Procedure Revision Committee has consulted the New Zealand Law Society, the district societies and the law schools, and has derived considerable assistance and support from these bodies.

Last August the Rules Committee adopted in substance the Revision Committee's *Draft Code.* Subject to a number of comparatively minor amendments to this draft the Rules Committee's intention is that the new Code, after final revision in the Parliamentary Counsel's Office, be promulgaged to the legal profession in the middle of next year and come into force early in 1980.

At the Committee's August meeting, the Solicitor-General read the following statement by the Attorney-General:

> "I greatly regret to be unable to be present at the Rules Committee's meeting on this occasion, marking the culmination of nine years' work by a subcommittee of the Rules Committee charged with the task of completely revising the Code of Civil Procedure.
>
> "The present Code came into force on 1 January 1883. It was the result of two years' work by a Royal Commission comprising the Chief Justice and four other Judges, the two Law Officers of the Crown, and others, including a future Chief Justice (the late Sir Robert Stout) and one the

Honourable J Wilson.

"Similar codes were introduced about the same time in most British common law jurisdictions. Many of these have been completely revised in recent years, but without any attempt to simplify procedure.

"At present there are five ways of commencing proceedings in the Supreme Court in New Zealand – writ of summons, originating summons, petition, originating motion, and (exceptionally) a Judge's summons.

"The subcommittee, in the draft Code which it has produced, and which this Committee will now consider, has substituted for all those originating procedures one only, namely, a statement of claim.

"By a happy chance this culmination of nine years' of labour by the subcommittee coincides with the near culmination of the work of the Royal Commission appointed to review the whole structure of the judicial system in New Zealand; and by a further coincidence the Chairman of that Royal Commission is the Chairman of this Rules Committee.

"I congratulate the members of the subcommittee upon the achievement of the task laid upon them, and I assure the Rules Committee that it has my support in bringing the work to fruition".

CRIMINAL LAW

VIOLENCE

Dr R H Culpan (49) studied medicine at Otago University and subsequently worked as a house surgeon to the Auckland Hospital Board, assistant medical officer at the Auckland Mental Hospital, and became the first cardiological registrar to be appointed in Auckland, working at Greenlane Hospital. He then spent three years at the London Institute of Psychiatry, a year at the Delaware State Hospital and a further period as Visiting Scientist to the National Institute of Mental Health in Washington DC, before returning to Auckland in 1962 to practise as a psychiatrist. In 1970 he was appointed Clinical Reader in Psychiatry to the Auckland Medical School. He is interested in farm forestry, music and sailing.

Why is there so much violence in today's world? Not only the violent physical assaults that fill our newspapers, but violence on the sporting field, violence in literature, in the theatre, in cinema, on television, violence on the roads, violence to children, violent dissonance in the arts and music, violence in business, violence in religion and even violence in the legislature. It seems that, as St Matthew puts it "... the Kingdom of Heaven suffereth violence and the violent take it by force".

Violence is, of course, a form of behaviour, but psychiatrists are not so much interested in the behaviour itself as in the aggressive emotion from which it springs and the source of this emotion has been the subject of aggressive debate for centuries. There are those who hold that man is inherently aggressive and that his murderous instincts derive from his ape-like origins, while others, like Karl Marx, believe that human beings are born with purely altruistic motivations and that aggressive feelings are acquired by exposure to a strife-ridden environment.

Archaeological evidence suggests that man was largely a peaceable hunter until the development of agriculture some 10,000 years ago. Once there was property to guard, and food supplies to protect, cultural differences appeared between communities, and personal jealousies arose between individuals, which led to antagonisms and violence.

The recorded history of man is shot through with conflict and killing and people over the centuries seem to have derived great enjoyment from gladitorial combat, public torture, witnessing executions and even in warfare. It would be easy to argue that human beings have an inbuilt lust for violence, but to draw this inference would ignore the unlimited capacity of people for sympathising with each other's painful experiences, provided that the person is in close contact with the sufferer. We have to conclude that both the potential for fighting and hunting, and the potential for caring and self-sacrifice, are qualities that we learn during our earliest years. Although we may all be born with the tendency to react aggressively, the extent to which it results in violent behaviour is determined by our environment and culture rather than our genes.

Changing patterns of violence

When people lived in small scattered communities, close to the land, violence does not seem to have posed a major problem. However, with urbanisation, rising population densities and more complex patterns of group differentiation based on social, occupational, intellectual and economic differences, the incidence of communal violence

has burgeoned, and a vast system of controls has been necessary to suppress it.

In one respect there is less violence per capita in the world today than at many previous times since, apart from one or two places, there is no major warfare in progress. On the other hand, the level of intra-community violence has shown a sudden upsurge and, if we are seeking to promote remedial measures, we must delineate the forms which this violence is taking and consider them separately.

Violence based on insanity

This type of violence is most likely to occur in a family or group setting and is invariably predicated on previous personality disorder or actual mental illness. Some individuals have an inborn proclivity to react violently to external stress and they may even have demonstrable aberrations in brain electrical activity which predispose them in this direction. Some 30 percent of New Zealand murderers are actually suffering from one of the major mental illnesses, schizophrenia or manicdepressive insanity, which is responsible for their homicidal behaviour. The remaining insane killers commonly have a history of an emotionally deprived or otherwise disturbed early environment. In many such cases the individual's childhood need for affection and security was denied and he became filled with jealousies, resentment, hate and fury, as may be seen looking at the behaviour of some young children. As such a person grows older his antisocial feelings become repressed in response to the demands of parents, teachers and society and, superficially, his eventual behaviour becomes socially acceptable. In response to provocation, frustration or alcohol, however, his deeper pent-up feelings may erupt into violent behaviour. Violence based on insanity is not increasing significantly in New Zealand and is thus of less immediate concern that other varieties.

Alcohol and violence

Alcohol in excessive amounts progressively impairs the higher intellectual functions so that deeper, more instinctive patterns of response are liable to emerge. In the last few years there has been an explosion in alcohol-related violence, including violence on the roads, which may be unmistakably correlated with the current escalation in the use of alcohol. Nevertheless it is not alcohol by itself which makes people aggressive; the angry feelings already existed in their deeper emotions, but were kept in check by a thin veneer of self control, which alcohol removes. The instinctive tendency to react violently, or to drive dangerously, is a product of cultural background and of life experience but, without alcohol, such proclivities are more likely to remain dormant.

Violent youth

This is by far the most alarming category of violence, not only on account of its rapid increase, but also as a result of our inability to understand it. Even if we accept that some young people have been reared with environmental disadvantages, life today in New Zealand would seem to have many overriding positive qualities – full employment (at least until recently), freedom, a good standard of living, unrestricted friendships and limitless recreational space. There are apparently excellent outlets for deeper aggressive drives, such as motor bikes, mountaineering, and competitive sports. With such benefits one might reasonably expect to see the flowering of full-fledged personalities. Paradoxically however, it is these seemingly favourable features of our community life today that engender the kinds of alarming behaviour that are obtruding themselves so much into our awareness. This behaviour includes not only violence but the dropout phenomenon, drug-taking and ex-nuptial births.

Our fathers and forefathers had a great advantage over our own generation – they knew where they stood. In earlier times life was hard and the threat of penury was real to many people. Nevertheless, by adherence to the humble virtues of work, order, discipline, the fulfilment of pledge and promise and with a mutuality of services rendered to each other amongst family members, a measure of security was possible. Father was the prime symbol (deservedly or otherwise) of hard work, reliability, adherence to customs, traditions etc and he provided a model for the developing personalities of his male offspring. These patriachal concepts were inevitably incorporated into the popular image of God. In times past mother was the mainstay of the family. She was nurse and teacher, she spun the yarn and moulded the candles. She worked hard and long but she had the satisfaction of knowing that she was needed and wanted.

A great part of these traditional structures have disintegrated in today's society. Father has often been demoted to a cog in a machine and his influence replaced by the media and by peers. One by one, mother's tasks have been taken away from her by domestic appliances and by social agencies, forcing her to embark on a life-long and often hopeless quest for a new role.

Without impressive or even adequate models for identification, and without external military threat providing a reason for cohesion, it is hardly surprising that today's young people, like their

parents, find themselves engaged in a demoralising search for *meaning* in their lives. Many are lucky enough to find what they seek – meaning in a fulfilling relationship, meaning in an absorbing and challenging hobby, in a particular religious group or sect, in business ambitions, excellence in the arts and so on; but for those who fail in their search there is only futility and boredom. One source of "instant meaning" is illicit drugs. Drug-taking provides the excitement of breaking the law, the fear of detection and the new subjective experiences which are possible in a "mindexpanded" state. All of these confer "meaning" to living, however spurious, and they effectively keep fundamental doubts and questions at bay.

Another possible source of meaning is violence, which becomes not the means to an end, but an end in itself. As *Time* magazine quotes, "The act of terror itself is an ideology ... if they [urban terrorists] cry and stamp their feet, no one pays attention, but by taking hostages, in a matter of minutes, the whole world is watching. This helps overcome their ego deficit ... what motivates many terrorists is a deep hatred of present society. They talk vaguely of socialism, but they offer no political theory. Nobody really knows what kind of society they envision".

This apparently meaningless, motiveless, violence amongst young people is increasing on a geometrical scale in some communities, eg New York, and our assumption must be that it will pose an increasing threat to our safety, and the stability of our lives, in the future.

Remedies

If the construction which I have set out is valid the outlook is pessimistic. We cannot justifiably anticipate that the measures of the police and judiciary against violence will have much greater success in the future than they have had in the past. Successful remedies will, of necessity, have to be directed against the deeper causes of the problem. There will need to be measures to encourage a maximum of order and consistency in the lives of young people, thus improving individual and community mental health. Moderation in liquor consumption, particularly in certain racial groups, must be further encouraged. In our New Zealand community, employment opportunities must be restored as quickly as possible before a whole new generation of embittered, unemployable people is created. Finally, we must make a major effort, using every possible educational approach, to provide young people with interests and challenges which will channel their aggressive drives into satisfying, fulfilling and non-violent activities.

Roger Culpan

A ZEALOUS OFFICER

There was recently reported from Toulouse a case involving police-public relations which might well have been an episode in one of Maigret's adventures. Toulouse is one of those towns in the south of France where a thick layer of modernity has not obliterated the ancient character of the streets and the people, and, amid the motor traffic, the inheritance of Languedoc and the spirit of the troubadours is still an ingredient in the lives of the men and women. Evelyne was an attractive girl who ran a boutique in the centre of the city, where the narrow streets create perennial parking problems. Daily she parked her car in unauthorised places. Almost daily it attracted a parking ticket which, with the insouciance of a beautiful woman, she as regularly threw away, till a couple of dozen had disintegrated in the gutter. French men and, even more, French women may be ungovernable, but the French pride themselves on the efficacy of their law, and Jacques, a young police officer new to the city centre, determined to have a word with her, so one morning he ambushed her emerging from her improperly parked car. Now French women in general and the women of Languedoc in particular, the heiresses of the ravishing and wilful Eleanor of Aquitaine, are not usually addicted to the prosy fallacies of women's lib, since they know far better methods of getting their own way. Evelyne responded to the official rebuke with a prolonged outburst of passionate protest and finally reacted to a threat to take her to the station by bursting into a storm of tears. Beneath every French policeman's tunic there is a gallant man. Seeing her so upset, Jacques offered to drive her home to recover, and she accepted.

Arrived at her destination, Evelyne apologised prettily for having been "so silly" and suggested that they might discuss the problem of the parking tickets over a drink. Would he come in? He would. It proved a prolonged and penetrating discussion and she did not return to her shop. When Evelyne's husband Philippe came home from the office he was surprised to find his wife dressing in the bed-

room. She was alone, but, with the atavistic instinct of suspicious husbands down the ages, he flung open the doors of the capacious wardrobe revealing Jacques with his clothes over his arm. It is doubtful whether even French police regulations provide an officer with any official guidance for his conduct in such a situation. With admirable initiative Jacques created a diversion by firing his revolver into the ceiling and proceeded rapidly in the direction of the street with his clothes and his equipment safe. (On second thoughts, the situation would fit less comfortably into a Maigret story than into a comic opera or an old Rene Clair film). Though he escaped from the wardrobe, Jacques, after his sensational eruption on the public highway, could scarcely keep out of Court, and the Magistrate, though admitting the mitigating circumstances that he had been "carried away by an excess of zeal", fined him £50 for indecent public exposure in his state of undress. He also found himself in professional trouble on a disciplinary charge of firing his revolver without sufficient cause. In a film or a comic opera he would finish up as a partner in the boutique.

Richard Roe *The Solicitor's Journal*
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CRIMINAL LAW

CRIMINAL LAW

Allan Nixon (56) grew up – so far as his stunting environment permitted – through the sugar-bag years. The seventh child of poor immigrants, he lived among the needy whites who, until Maori people came to relieve them, formed the urban proletariat of New Zealand. Having perfected his social education with four years each of imprisonment and factory labour, Mr Nixon taught psychology to the age of 35, spent his middle years as a criminal lawyer, and, with the onset of senility, returned to a University post in 1970.

I am briefed to discuss alternatives to prosecution. – You know perhaps that the Department of Scientific and Industrial Research has recently made forecasts on the likely volume of criminal work to be handled by our Courts in the near future. Its predictions have been included in submissions made by the Justice Department to the Royal Commission on the Courts. The need to develop alternatives to prosecution is made clear by the estimates provided for 1995, which is only 17 years hence. It appears that in that year some 400,000 charges carrying a right of jury trial may come before our Courts.

Since jury trials average some eight hours each, you can see that our Judges are going to be busy, if the right of jury trial is in fact exercised by many of those entitled. Some rather playful arithmetic suggests that we could, in 1995, need a thousand Judges in the criminal jurisdiction of our Superior Court and I don't really think we're going to get them. In addition to charges carrying election, will be another million or so summary offences.

The whole thing begins to assume nightmare proportions, and you may well say "I don't believe it. Not even New Zealanders are so silly as to be heading into a situation where one half of their proletariat is in prison and the other half is guarding it". Well, of course, I'd agree with you if this were a matter only of the prediction of future events. But examination of past events shows the process is actually in train, and has been in train for some time. We already have in our prisons twice as many people, proportionate to population, as we had 40 years ago. (Prisoners per 1000 mean population: 1938–0.48; 1977–0.94). In addition, we have hundreds more in periodic detention, so that the proportion of citizens whose liberty is being invaded at the moment exceeds twice the proportion of 1938. There is no evidence that this process is abating, and the projections for 17 or 20 years hence are thus not as fanciful as might first appear.

I should at this stage make one comment. I don't for a moment imagine that we New Zealanders are, in fact, more villainous than we were 40 years ago. I don't think that in any significant sense crime is increasing. We are, of course, having more motorcars converted, because there are more motorcars to convert. The monetary value of things stolen is going up by leaps and bounds because of inflation. But these are changes about which we can be philosophic. If I have two motorcars, as I now have, and have a car converted twice as often as I did when I had only one motorcar, there's little to be concerned about in that. So let's not worry that the nation might be falling into a moral decline. If it is, there's not much we lawyers can do about it anyway. What we are witnessing is not in truth so much an increase in crime,

as an increase in the *processing* of crime, and this is the real source of our difficulties.

We are processing more of our crime because we have more policemen. Over the period in which our prison population has doubled, by comparison with our total population, so also the proportion of policemen in our midst has almost doubled, and a phenomenon observed world-wide is that the more police you have the more apparent crime you have. This seems paradoxical to some people, who think of the police as preventing crime, and who conclude that an increase in the number of policemen will result in a corresponding decrease in crime. That could even be true, but anyone who thinks that more policemen will reduce *official* crime rates is not familiar with the reality of criminal offending. Criminal offending is a very, very widespread activity indeed. Some of you will know of the many Dark-figure studies which show that, as a generalisation, there is, in contemporary western society, about ten times as much crime as the police discover. An increase in police presence simply brings more of that crime to light. We've had some wry observations in recent years on the effect on this, in respect for example, of juvenile offending, where a new image has been presented by the enforcement authorities, namely "We're trying to help youngsters in trouble – if you know of a lad who's been breaking the law, let *us* know and we'll straighten him out". As a result of that kind of campaigning, the rate of prosecuted juvenile crime has risen enormously, from an annual rate (per 10,000 at risk) of 75 cases in 1951 to near 300 cases in 1971.

Well now, it would be politically impossible to reduce the number of our policemen, and it wouldn't for that matter be a very kind thing to do, because police have their careers to make just as we have, and there would be little promotion within a shrinking police force. Also, it's not always a good thing that crimes don't, in some sense, come to light. Provided the right things happened as a result, I'd be perfectly content to have a hundred cases a week of child abuse coming to light in our country. Provided the right thing was done about it, I would like to see everybody arrested who drove with more than a certain amount of alcohol in his blood. The crucial question is 'What *is* the right thing to do about crimes which are discovered?', and that's what we're talking about in discussing alternatives to prosecution. The lawyer's approach has been to keep the criminal justice system much as it is, but to streamline its operation so as to process more people, faster. I don't think that's necessarily a good idea.

The problem can be approached at many levels. Thus, we have lately had proposals to appoint Judges of less eminence than our present Supreme Court Judges to preside over minor jury trials. Depositions, it seems are being phased out. We have already in force an excellent scheme for dealing with very minor offences without court appearance. These steps although useful will not, by themselves, be enough. We will suffer the chaos overtaking American jurisdictions. Our trial process will become so clogged, that we'll be involved in the sordid transactions of a plea-bargaining kind that are becoming a feature of the administration of American criminal justice, and have lately made an appearance in Britain. I don't think that's a good idea, either.

Now there may be among you some unlawyerly radicals who think that the basic alternative to so much more prosecution would be so much less crime. You might look forward to a society where people didn't in fact very often pinch one another's belongings or beat one another up, or play naughty games under the plum trees with consenting girls, or unconsenting ones. Well, I think that in time a society of that kind could develop, although not perhaps here in New Zealand. But it's not a society which lies within the power of lawyers to evolve. What's required to reduce crime itself is all sorts of esoteric things like natural childbirth, demand feeding, breast-feeding, pre-school education, school curricula relevant to real needs, a re-structuring of school experience to make it an experience of success and achievement instead of defeat and failure as it is today for half the youngsters who pass through it. It's not in our power as lawyers to bring this utopia about. There's not a great deal that legislation can do towards effecting social changes. Happier states of affairs do, to a degree, exist in the developed countries, but we in New Zealand in the 1970s must simply accept it that we're not among the developed countries. As you probably know, only half as many babies and toddlers die avoidable deaths in Sweden as they do here. That's not because of defects in our Health Act. It's because of defects in our humanity, and we can't legislate for greater humanity.

The only area in which lawyers can be effective against crime is in relation to the public processing of breaches of law. So let's just assume that the volume of crime we have is pretty much a constant about which we can do nothing, and consider the different ways in which we might deal with its existence.

The title "Alternatives to prosecution" has very little meaning unless we first ask "the prosecution of whom?" You see, there are some groups in the community who at present are hardly prosecuted

at all. Women and white collar workers, especially professional people, are cases in point. We are already employing alternatives to prosecution in respect of criminal delinquencies by people in these groups. I need not tell you what we do when a solicitor gives his wife a black eye, when a doctor tampers with his daughter, when an accountant takes home a carton of toilet paper from his firm. You know perfectly well already what we do. We hush the matter up; we pretend it didn't happen. Dark-figure studies over 40 years have shown that criminal delinquencies occur throughout society at rates which don't vary *much* – although they *do* vary-between men and women or between casual labourers and professional people. We institute prosecutions against young male casual workers in some occupations at the rate of about one prosecution per year in respect of each 30 workers, and against graduate professionals – lawyers, doctors, academics, at a rate of less than one per thousand workers each year. You couldn't ask to be less prosecuted than that.

So when you ask me to speak about alternatives to prosecution you want me, I think, to talk only about alternatives to prosecution of people who at present are at significant risk of *being* prosecuted. Most criminal prosecutions as you know, are launched against lads in the 17–24 year old group. Only some boys in this group are at much risk – the brunt of prosecution is borne by those lads who have left school without School Certificate. This is a surprisingly small group, comprising indeed only 5 percent of the total New Zealand population. So really you are asking me, what can we do with *these* youngsters instead of prosecuting them?

This isn't a plea for greater gentleness in dealing with underprivileged people. If you're gentle with under-privileged people many of them cease to be underprivileged, and that creates problems of its own. My case for developing alternatives to the prosecution of the so-called 'submerged tenth' of our society is simply that it is only the prosecution of *these* people which is clogging up the system. The male members of our 'submerged tenth' form, as I mentioned, only five percent of the population, but we are prosecuting such a high proportion of them, and such an increasing proportion, so often as to render our criminal justice system almost unworkable. Most of you will know for instance that we have been putting about half the Maori boys in New Zealand through the criminal justice system at least once before their seventeenth birthdays, and some good proportion of the remainder during their next few years. I hope you won't interpret that as a matter of racial bias, because it isn't; we deal with all young proletarian males in the same fashion, regardless of their racial origins. The Maori figures just come conveniently to hand because of the way our statistics are collected.

So it's for young lower class males that the alternatives to prosecution must be developed. As I mentioned we have already developed alternatives to prosecution for people like ourselves. So the remedies we are seeking for congestion in the Courts need not be revolutionary, across-the-board proposals – they can be quite simple and rather conservative adjustments in the treatment of a small – five percent – minority of our citizens. Basically, no more is needed than that we should prosecute fewer of their delinquencies.

If we knew why the young unskilled worker does suffer prosecution so much more often than we do, we might be able to devise some strategies for reducing his proneness to prosecution. We do have some clues, in addition to the fact that he commits more offences. One is, of course, that he commits his offences in places to which police have easy access – he commits his offences in streets and other public places. He doesn't do that to be perverse, or in the hope of being caught, but simply because he spends so much of his spare time in such places. We, of the middle class, have considerable areas which are so to speak "no-go" areas for the police. Consider two 18 year old lads, one at King's, and the other who, having left school at 15 is now beginning to drink at some central city hotel. If the King's boy wants a fight with his friends he can have it in the grounds of King's, and the possibility of any policeman coming along and arresting him is minimal. If his twin, with the same kind of provocation, fights with his cobber outside a hotel in Karangahape road, there is very likely indeed to be a prosecution. The middle-class lad who goes on to university, spends his years to the age of 23 or 24, largely in traditional "no-go" areas of the police such as university campuses, so that his delinquencies are simply not observed, and not prosecuted. And after the age of 24, virtually no one is criminally prosecuted, unless of course he has first been prosecuted before that age.

I think we might do something to reduce the incidence of prosecution of the group now being so heavily prosecuted, by providing for *them*, also, certain "no-go" areas in our cities. This has been done successfully in other cities. Its application to Auckland would require some consultation with planning authorities and so on, but perhaps the Western Springs park could be declared a "no-go" area, where young working class folk of that mind might foregather to fight and fornicate with their friends as they saw fit, safe in the knowledge that no policeman would come uninvited into their territory. There must,

of course, always be a right of the police to come where they *are* invited, because otherwise those who suffered crimes and wanted revenge would be denied it, but I see no objection to the principle that as with university campuses so also with designated parks, police should go there only *when* invited. The intrusion of police into areas where they are not welcome results in thousands of prosecutions each year for "good order" offences, obscene language, assaults on police and so on.

You know how pleasant it is to drink at your club. Have you ever thought how unpleasant it would be to have policemen threading in and out as you sat quietly drinking your beer? Such things act, rightly or wrongly, as provocations to men in their cups, and I am perfectly sure that if policemen did wander in and out of your club there would be incidents of rude words and other cruelties towards policemen, such as are so often prosecuted when they happen in bars where the lower orders drink. It's a healthy rule observed in the East End, that police keep away from areas where drunks want to fight. I can think of nothing less tactful than for a policeman to go among people who are perfectly happy to be drunk and perfectly happy to beat one another up, doing no harm to anyone but their equally silly companions, and apparently enjoying themselves just as much as we do on wild nights at the club.

The second reason for the heightened susceptibility of the young unskilled worker to prosecution, particularly for offences against the person, is of course the victim he chooses. We all, from time to time, are victims of violent crimes of one kind or another, but to the person of any sophistication the idea of calling a constable to solve his resultant problems for him borders on the bizarre. The truth is that the middle-class don't complain to the police about being victims of personal crime. The complainants in crime, as many studies have shown, are people of the same social status as their assailants. That was thought a novel finding of the American President's Commission on Crime, but it's a perfectly natural state of affairs. Crime is very much a matter between friends. We don't bother to murder or to beat up or to rape people outside our own social group, because we don't have enough to do with them, we don't *care* enough for them, we're not engaged emotionally with them to the requisite degree.

Now because of that intimate quality of crime the victims of the young lower class offender are of course his own companions, friends, acquaintances and neighbours. And these are people inherently very likely to complain to the police about wrongs done to them, because they're not often very resourceful people. They can't think of anything more appropriate to do, than to run off and tell daddy in the hope of seeing daddy punish their delinquent brother. It's the pattern of ugly family life which is simply being reproduced on the still only semi-adult level at which the 20 year old convicted offender and his friends live. You must have noticed again and again in your own practice that complainants, particularly in personal crimes, belong to the social group to which the offender himself belongs. In the American scene for example it's Blacks who are the victims of Black crime. In our own society it's factory girls who complain of being raped. Girls who are not factory girls may also in fact get raped, according to some studies, at about the same rate as those unfortunate factory girls, but they don't run to the police about it. So it's only factory *boys* who get charged with rape, because it's only factory boys who rape factory girls.

Well now that's an intractable fact of life. The lower class worker *must* commit many of his offences against people of his own kind, and people of his own kind must, with an equal logic, complain to the police about them, because they can't think of anything better to do.

I don't think there should be any limitation on the right of people to complain to the police. Such complaining seems to fill a real need, and police officers with a gift for therapeutic listening can do much to abate tensions.

What's *not* good, is that prosecutions should so routinely follow. In countries with a more developed criminal justice system, prosecutions are commenced only when some result is required which can't be obtained by a means short of prosecution. If an offender's guilt is in dispute for example, and something of consequence depends on the issue, then a prosecution will be necessary; or again, if an offender, in the public interest, or his own interest, requires to be deprived of his liberty, then recourse to Court must be made. But of course such things don't happen very often, even in New Zealand, and most excursions to Court are unnecessary.

Now I come to the most paradoxical and difficult aspect of the subject. You asked me to speak on alternatives to so much prosecution, and you would I'm sure have been content if I had dealt with concepts like that of diversion. Diversion as you know, is the procedure whereby, when an offender's guilt has been established to police satisfaction, but before his trial is commenced, he is given an opportunity to be "diverted" from Court proceedings into an alternative programme, which may involve his counselling, participation in community work, and the like. The scheme is working well enough, in a pilot way, in some American States, and it is said to be cheaper than the traditional process-

don't want to speak *against* such proposals. It is an excellent thing if some lad who has behaved reprehensibly goes off in at least a semi-voluntary way to do some community service instead of being dragged through Court and flung in goal. I hope we will adopt diversion in suitable cases.

But the point I must make is that such schemes are not an answer to our present problem. Our problem is that we are simply processing too much crime, and are threatened with the prospect of processing vastly more in the near future. If we don't put our 400,000 indictables through the Courts in 1995 but put them through diversion schemes instead, we're still going to have a giant crime-processing industry. Moreover of course if diversion becomes an accepted practice, it will in time come to have *some*, although not all, of the damaging effects which prosecution and imprisonment have. That one had been "diverted" for one's crimes could carry in time much of the stigma at present attached to being *convicted* for them.

What is needed is to abort the whole process of criminalisation at a very much earlier stage – or indeed, not to commence it at all. And it is here that the developed countries have so much to teach us.

You will all be familiar I think with the fact that serious crime is not a major problem in Holland. Aggressive and sexual offences known to the police are edging down; deaths and injuries by motorcar negligence are well down from the 1970 figure, despite the increased number of cars; car conversions did rise a few years ago to a dizzy peak of 20 percent of the New Zealand rate, but have since fallen to about 12 percent of our rate; other property offences moved up, with post-war affluence, to about half our rate, but are not showing much growth at present. The overall position must from our point of view, be seen as fairly satisfactory. It has been achieved, as you may know, with very little recourse to Courts, and with what we would regard as only token punishments on the few people sentenced. Just how dramatic that difference is, can be seen from a comparison of sentences in the one-and-under-five year group. In the latest available annual report, the Dutch imposed 484 such prison terms. Had they used sentences of this length as often as we do they would have imposed 6,492 such sentences.

How do they contrive to prosecute so few people? It's not that the Dutch citizen is extraordinarily law abiding. It's just that Holland has a developed criminal justice system based on a rational and fully conscious policy of keeping crime within bounds. We ourselves do not have anything which might be discerned as a policy on crime; moreover, if we had one, we wouldn't be able to implement it.

My major proposal therefore is that we first develop the machinery for implementing a criminal policy, and then devise such a policy.

The essential machinery of the Dutch system is in two parts. The first is the police force. The constables and non-commissioned officers are much like our own police. They are inducted through a one-year full time training course. There is separate entry to commissioned rank. This is the key to police success. An officer of the police has considerable status. The career attracts intelligent and idealistic people. Entry is highly competitive, and the type of young man accepted is one who would be welcome in the professional schools of universities. For these officers, there is an initial four-year training course with an academic level certainly not below that of a New Zealand Arts degree, and an extensive follow-up programme. Men with this background are able to understand the role of the police, and to ensure that it is fulfilled.

It is only these commissioned officers who have any significant authority. They alone can report an incident to the functionary called the "Officer of Justice". The Officer of Justice alone can institute prosecutions.

The police officer reports to the prosecutor only those matters which he himself is unable to resolve. To help him resolve matters he has a wide range of agencies at his disposal – probation officers, welfare officers, marriage counsellors and the like. The aim is very much to "contain" incidents, to defuse them. To define an incident as criminal is a reluctant last step; a preferred course is to treat it as a dispute to be resolved between the parties themselves, with the police acting as arbitrators. They also have power to accept fines as an alternative to prosecutions in respect of a wide range of nominated offences. The statistics are interesting. – Of non-indictables in 1975, only 289,000 went to hearing. The police and the prosecutors within their respective discretions, settled two million such cases.

The prosecutor or officer of justice is the second key figure in the Dutch system. The prosecutor is a man of very great eminence, having the same status, training and salary as a Judge of the Court to which he is attached. Prosecutors are selected in competitive entry from outstanding law graduates, and undergo six years' post-graduate training before their first appointment. It is expected of the prosecutor that he will settle all but the most intransigent matters. He may prosecute an offence only where he can satisfy the Court that it is in the interest of the offender or in the public interest, that the help of the Court should be invoked – as for instance where guilt is disputed or where the offender may require to be deprived of his liberty.

Both the police and the prosecutors are under the direction of the Ministry of Justice, so that a consistent and equable policy may be followed. An aggrieved member of the public is free to appeal against a prosecutor's decision not to prosecute, but it doesn't seem to happen often. Of the graver crimes, which come before District Courts, the Courts themselves in the last available year heard only 59,000 cases, the Prosecutors having disposed of 60,000 under their own discretions.

Now if we are going to *have* a criminal justice policy and I hope we are, because the results of not having one are disastrous, then we must develop agencies, whatever we call them, fulfilling the functions served by the Dutch police and prosecutor services, because this is the only way to *implement* a criminal policy. Experience in New Zealand has shown that if you send citizens to Court on criminal charges, the Courts are going to convict and imprison them in increasing numbers, despite chidings from the Justice Department. To arrest that evil, we must simply stop sending people to Court. And the only realistic way of doing *that,* is to develop a police and prosecutor service which can find more worthwhile alternatives. These alternatives can't be set out in legislation; they must arise spontaneously from human judgments of what is needed in particular circumstances, and that responsibility can't be adequately discharged by a police force with two years' secondary education, or by prosecutors whose only claim to intellectual eminence is their rank as police sergeants.

You see, the question at the heart of criminal justice policy is not "who deserves punishment?" for we all deserve that, but the more difficult question "What will be the effect on his future behaviour of the contemplated punishment or non-punishment, of the offender?" (There is a related question, not very important, of the effect on behaviour of persons *other* than the offender). The rule seems to be that most people can survive punishment, at least of a milder kind, without much deterioration of their behaviour resulting, but there are other people on whom the effect of punishment is catastrophic in terms of their subsequent conduct. It is by *not* punishing these people that we gain the best assurance of their future conformity. So the task of the prosecutor in selecting people for prosecution is one of enormous complexity, calling for the most refined judgment. It is horrifying to enlightened opinion that our prosecutors prosecute merely on the ground that the law has been breached. In a developed judicial system the whole background of the offender is explored – through probation reports and the like – before any decision about prosecution is made, and a decision to prosecute *is* made only where the prosecutor has in mind a punishment which he foresees as likely to improve the defendant's behaviour. It is of course as you know, the prosecutor who suggests the sentence, subject only to an overriding discretion in the Judge. When a criminal justice system operates in this fashion, backed by empirical research which is communicated to and *understood* by judicial officers, crime is brought under control. Over the last available seven years, when our prison population has risen by 50 percent, the Dutch prison population has fallen by a third, and while our sentences imposed continue to rise in a horrifying way, the average Dutch sentence has fallen from 61 to 43 days.

It's not difficult in these circumstances to see why our indictables have doubled over the same period: we are dealing too harshly with too many people whose will to conform is simply too weak to withstand such treatment without falling back into more serious crime. Of the 1605 men who were in our prisons at the last penal census, all but 142 had previous court appearances, two thirds of them had six or more such appearances, and most had been in prison before. There's not much future in a penal policy like that – in Holland, most of the people convicted of offences carrying the possibility of imprisonment are being convicted for the first and last time.

The essence of my case is therefore this –

It's becoming procedurally impossible to prosecute so many people. It's also inequitable that such a disproportionate number of those we prosecute should be disadvantaged young males. The result of so much prosecution is to build up a hard core of serious offenders whom we could do without. The answer *does* lie in alternatives to prosecution, but we can't usefully just tack on a few diversion schemes to our existing criminal justice system. We must instead develop machinery to inhibit the defining of so much behaviour as criminal; to deal with deviance informally, to use prosecution only in those rather few cases where it is the most apt means of inducing conformity to the law, and to impose further punishments only where *they* are likely to induce law-abiding behaviour.

Ladies and gentlemen, I would have liked to present you with a solution. Instead, I offer you only a problem – the problem of interposing some mature judgment between a crime and its prosecution. But I do assure you that the problem is not insoluble, and that if you resolve it, the nightmare of increasing prosecutions will disappear, the Courts will be free to hear your tedious civil cases, and, if that matters, we shall have a more just and gentle society.